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**TESTIMONY OF**

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**BEFORE THE READINESS AND MANAGEMENT SUPPORT SUBCOMMITTEE OF**

**THE SENATE**

**COMMITTEE ON ARMED SERVICES**

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Chairman Akaka, Ranking Member Thune, and Members of the Committee: thank you for the opportunity to appear before you today to discuss four topics of interest to your Subcommittee: the role of private security contractors (PSCs) in Iraq and Afghanistan; the role of private contractors in the interrogation of detainees in those conflicts; the steps DoD is taking to implement sections 861 and 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 ; and the status of efforts to address gaps in the legal accountability of and jurisdiction over private security contractors in Iraq and Afghanistan.

Any discussion of the roles of contractors in performing private security services and detainee interrogations should be based on recognition of the historical background of and current policy framework governing the use of contractors in these roles.

## **Background**

The use of civilian contractors in support of the armed forces is not new. Historically, contractors have been used by the U.S. Government and other governments to perform a variety of military support roles, including private security, intelligence, and interrogation. This practice has been so long established that contractors are specifically recognized in both U.S. policy and international agreements of long standing relating to their status as prisoners of war:

- Article 50 of the U.S. Army General Order No. 100 (1863) states: “Citizens who accompany an army for whatever purpose . . . if captured, may be made prisoners of war . . . .”
- Article 13, Annex to the Hague Convention IV (1907) states: “Individuals who follow an army without directly belonging to it, such as . . . contractors, who fall into enemy's hands . . . are entitled to be treated as prisoners of war . . . .”
- Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (1949) states: “Prisoners of war . . . [include] persons who accompany the armed forces without actually being members thereof, such as civilian members of aircraft crews . . . supply contractors . . . .”

Through World War II and Korea, support from the private sector was common, but normally performed in secure areas, since the battlefield was usually demarcated between secure and non-secure areas. Contractors assumed key roles in the occupation phase of these conflicts – in the securing of peace and the reconstitution or reform of state security institutions.

As the Vietnam conflict unfolded, the nature of the battlefield changed and the role of contractors expanded to provide construction, reconstruction, intelligence, and security services in non-secure areas. Contractors were also key players in reconstruction, economic development, and development of institutional governance capabilities of the host nation.

Since Vietnam, DoD has become increasingly dependent on contractors, both at home and when deployed, to perform critical support functions that are integral to the success of military operations, but not inherently governmental functions. Several factors contribute to the increased DoD reliance on contractor support:

- The shift to an all volunteer military force in the 1970s;
- An effort to capture a “peace dividend” following the collapse of the Soviet Union, which led to the significant reduction of United States Government military and civilian forces over the last 15 years.
- Initiatives (e.g., including A-76) to transfer work that could be done more cost-effectively by contractors than by military forces or DOD civilians;
- The increasing technical complexity of military equipment and Information Technology (IT) hardware and software, requiring maintenance by a narrow set of in-depth, sometimes proprietary technical skills that are not cost effective for the military force maintain a capability to support.
- The shift from traditional equipment sustainment programs to outsourced Performance Based Logistics (PBL) programs, to improve equipment readiness at lower costs.

As a result, the US military force has been reduced from 2.1 million in 1989 to less than 1.4 million today, and the total US Army from 111 combat brigades to 76. As dependence on contractors has increased, it is now common for contractors to provide a wide variety of support services, and even to be embedded with our military units

performing critical technical support functions. For example, the GAO noted in 2006 that a Stryker brigade typically deploys with 75 technical support contractors, in addition to those performing the highly technical battle damage repairs at forward support facilities. Similarly an Apache Battalion deploys with embedded contractors, whose numbers may vary due to mission requirements to perform support missions for them in the field.

The history of DoD's (and its precedent organizations') use of civilians accompanying military forces to forward areas is shown in the table below.

### **Civilians Accompanying the Force Historical Perspective\***

<b>War/Conflict</b>	<b>Civilians/Contractors</b>	<b>Military</b>	<b>Ratio</b>
Revolution	(est.) 1,500	9,000	1:6 (est.)
Mexican/American	(est.) 6,000	33,000	1:6 (est.)
U.S. Civil War	200,000	1,000,000	1:5 (est.)
World War I	85,000	2,000,000	1:24
World War II	734,000	5,400,000	1:7
Korean Conflict	156,000	393,000	1:2.5
Vietnam Conflict	70,000	359,000	1:5
Desert Shield/Storm	9,000	500,000	1:55
Balkans	20,000	20,000	1:1
Operation Iraqi Freedom **	~163,590	~160,000	1:1

*\*Source: Zamparelli, Steven J., "Competitive Sourcing and Privatization: Contractors on the Battlefield: What Have We Signed Up For?" Air Force Journal of Logistics, Volume XXIII, Number 3, p. 12.*

*\*\*Data addresses only DoD contractors and does not address civilians or contractors supporting other U.S. Government Agencies and Departments.*

At the same time, military operational tempo has increased significantly under the Global War on Terror (GWOT) and as a result of the proliferation of regional conflicts that ensued with the end of the stability engendered by the Cold War balance of power. From 1990 to 2000 the US Army alone has deployed troops on 36 occasions, compared to 10 deployments during the 40 year Cold War.

Consistent with applicable laws and regulations defining inherently governmental functions, the structure of our military forces has been adapted to this environment. DoD identified opportunities where competitive sourcing of contractor support for our deployed forces would allow DoD to concentrate its manpower to distinctly military activities in support of our National Military Strategy. This focus is reflected in the current DoD Directive 1100.4, "Guidance for Manpower Management" (February 12, 2005), Paragraph 3.2.4.3., which states, "During a conflict, military personnel shall be assigned only to those tasks that directly contribute to the military effort . . . ."

“Military effort” is generally defined as the inherently governmental function of the military force role to engage in combat -- to identify, close with, and destroy enemy or terrorist forces.

### **Private Security Contractors**

Recently, questions have been raised about the “appropriateness” of using private security contractors in areas of military operations. DoD’s decisions to use private security contractors (including subcontractors) are in compliance with current U.S. government policy and regulations. Relevant policy direction and guidance on this subject are found in the following:

- Circular A-76 (amended in 2003);
- The FAIR Act of 1998; and
- The current Federal Acquisition Regulation, including the recent final rule to add a new FAR Subpart 25.3, which specifically governs the contracting for private security contractors.

It is significant that the final rule-making on Subpart 25.3 (Federal Register: February 28, 2008, Volume 73, Number 40, pages 10943-10959) explicitly recognizes that:

- The United States government has the authority to hire security guards (i.e., private security contractors) worldwide (page 10944);
- The protection of property and persons is not an inherently governmental function (page 10944); Also see FAR 7.503 (d)(19);
- There is an important distinction between self-defense and combat operations, and that individuals have an inherent right of self defense (page 10943);
- Private security contractors are not mercenaries and are not authorized to engage in offensive operations (page 10944);
- Private security contractors have been given a mission to protect other assets/persons, and so it is important that the rule reflect the broader

authority of private security contractors in regard to the use of deadly force (page 10944);

- The standard on the use of deadly force by private security contractors should be when it “reasonably appears necessary,” a standard in DoD Directive 5210.56 that applies to the [defensive] use of deadly force by military security personnel (page 10944);

DoD Instruction (DoDI) 1100.22, “Guidance for Determining Workforce Mix” (issued September 22, 2006, and updated April 6, 2007) provides additional guidance on the strategic structuring of military, civilian, and contractor forces. It states that, “the Department of Defense may authorize deliberate action against another sovereign government or non-state actors on behalf of the United States (i.e., the authority to plan, prepare and execute operations to actively seek out, close with, and destroy enemy forces, including the use of firepower, and other destructive and disruptive capabilities on the battlefield. Combat authorized by the U.S. government is IG [inherently governmental] . . . (Paragraph E2.1.3.). PSCs are not authorized to participate in combat operations.

Other sections of DoDI 1100.22 describe security operations under conditions that could make them inherently governmental or not inherently governmental, as follows:

- “Security provided for the protection of resources (people, information, equipment, supplies, etc.) in uncontrolled or unpredictable high threat environments inside the continental United States or outside the continental United States entails a wide range of capabilities, some of which are inherently governmental and others of which are commercial. Security is IG [inherently governmental] if it involves unpredictable international or uncontrolled, high threat situations where [military] success depends on how operations are handled and there is a potential of binding the United States to a course of action when alternative courses of action exist.” (Paragraph E2.1.4.1.). PSC operations and missions are not of a scale to impact the overall success of the military mission or to bind the United States to any course of action other than the one selected by it.

- “Security forces that operate as part of a larger, totally integrated and cohesive Armed Force typically perform operations that require deadly force and substantial discretion.” (Paragraph E2.1.4.1.2.). However, DoD PSCs do not operate as an integral part of a larger military operation, and their operations are governed by strict Rules on the Use of Force (RUF) and escalation procedures on the use of force.
- “Security operations could entail defense against a military or paramilitary organization whose capabilities are so sophisticated that only military forces could provide an adequate defense. This includes situations where there is such a likelihood of hostile fire, bombings, or chemical attacks by groups using sophisticated weapons and devices that, in the judgment of the military commander, the operation could evolve into combat.” (Paragraph E2.1.4.1.3.). PSCs carry out strictly defensive security missions, with emphasis on attempting to disengage and leave the area as soon as possible.
- “Security operations that involve more than a response to hostile attacks typically entail substantial discretion and are IG.” (Paragraph E2.1.4.1.4). Policies governing PSC operations emphasize that their security mission is strictly defensive in response to threatened hostile attacks.
- “A decision is not IG if it can be limited or guided by existing policies, procedures, directions, orders, or other guidance that identify specific ranges of acceptable decisions or conduct and subject the discretionary authority to final approval or regular oversight by government officials.” (Paragraph E2.1.4.1.5.). Again, PSCs operate under strictly defensive Rules on the Use of Force (RUF) established by the military commander, not combat-oriented Rules of Engagement (ROE).
- “Contingency contractors may provide security services for other than uniquely military functions provided the geographic Combatant Commander:
  - “Clearly articulates rules for the use of deadly force that preclude ceding governmental control and authority of IG functions to private sector contractors . . . . ;
  - “Sets clear limits on the use of force . . . ;

As indicated above, PSCs operate under clearly articulated policies and rules established by the geographic Combatant Commander and the local area commander (e.g., GEN Petraeus).

- DoS and DoD are not the only government agencies to employ PSCs with the right to use deadly force. For example, 10 CFR 73.50, permits contract security personnel protection nuclear material to use deadly force. Also, the U.S. Marshal Service employs private security contractors to guard prisoners being transported between locations, armed and with the authority to use deadly force.

In summary, DoD's current policies are in compliance with these regulations and policies. Specifically:

- The mission of PSCs is strictly defensive – protecting persons, facilities, places or supplies, depending on the specific contract under which they operate. They are specifically prohibited from engaging in combat (offensive) operations.
- PSCs do not operate as part of a larger, totally integrated and cohesive military force, where their actions could affect the success of the military mission could be adversely affected, or could bind the U.S. to a course of action where alternative courses of action exist.
- All DoD PSCs in Iraq and Afghanistan are contractually bound to follow the policies and rules established by the USCENTCOM, MNF-I, and CJTF 76 commanders. These rules include specific language on Rules on the Use of Force (RUF), which are entirely defensive in nature. These rules call for emphasis on avoidance of conflict and de-escalation of the use of force where possible. When force is required, private security contractors are trained and instructed to use graduated force response-sequential actions which begin with non-lethal force response measures to ward off an attack such as firing flares, shining bright lights, or blowing horns. Only when these actions are ignored, as required by the situation, do they escalate their response, such as firing into the air or shooting into the engine block of an approaching vehicle. Use of deadly force aimed fire is authorized only as a



last resort to kill or disable the individual or individuals posing the threat, while minimizing the possibility of casualties among innocent persons.

- All U.S. Government PSC operations in Iraq are under the oversight of the battle space commander to the area battlespace commander, who can redirect or terminate a private security operation that would enter an area of combat operations, or have a high risk of either being attacked or of risking causing casualties among innocent civilians. Final authority for U.S. Embassy moves rests with the Chief of Mission, but he will generally honor the battlespace commander's recommendation. The battlespace commander also has the authority to take control of any battlefield situation, including one in which a private security contractor is being attacked or is involved in an incident. Similar controls will be put in place shortly for Afghanistan under Section 862 of the 2008 NDAA.

As of the end of the 1<sup>st</sup> quarter, FY 2008 (December 31, 2007), CENTCOM reported that there were approximately 6,467 DoD-funded armed PSCs in Iraq and approximately 2,745 DoD-funded armed PSCs in Afghanistan. The table below illustrates the distribution by nationality and delineates armed versus unarmed PSCs in Iraq and Afghanistan.

**DoD Private Security Contractors in Iraq and Afghanistan  
as of 31 December, 2007**

	<b>Total</b>	<b>US Citizens</b>	<b>Third Country National</b>	<b>Local/Host Country National</b>
Total DoD PSCs in Iraq	9,952	830	7,590	1,532
Armed PSCs in Iraq	6,467	429	5,318	720
Total DoD PSCs in Afghanistan	2,998	19	30	2,949
Armed PSCs in Afghanistan	2,745	16	30	2,699

These PSCs are employed in accordance with the guidance outlined above as well as paragraph 6.3.5 of DoD Instruction 3020.41, *“Contractor Personnel Authorized to Accompany the U.S. Armed Forces,”* October 3, 2005. This paragraph provides that

contracts shall be used cautiously in areas where major combat operations are ongoing or imminent. In accordance with this paragraph, the Combatant Commander weighs the following factors when considering specific security contracts: where the contract security personnel will operate; the anticipated threat; what property or personnel is to be protected; the manner in which the contractor will be operating in areas of increased risk, including command and control, the sharing of threat information, and communication with forces; and the training and qualifications of the contract security personnel.

In a recent audit of private security contractors in Iraq, GAO noted significant improvements in private security contractor coordination and oversight and in the tracking and reporting of incidents when they happen. Notwithstanding media coverage regarding incidents involving private security contractors, the frequency of serious incidents among DoD private security contractors is low. The period of August 2004 through February 2008 covers a period of rampant insurgency and sectarian violence in Iraq affecting U.S. military forces. During that time, 19,268 DoD contractor convoy operations were recorded. Of those, only 151 (or less than eight-tenths of one per cent) involved the discharge of a firearm by a private security contractor, and not all of those involved aimed fire at an enemy combatant. This was in spite of the fact that during that time, 1,441 hostile attacks were made against those convoys. These statistics reflect a high degree of discipline and effective management of DoD private security contractors operating within a strict policy framework.

The recent execution of the Memorandum of Agreement between DoD and the State Department is having an even more disciplined effect on PSC operations in Iraq. GEN Petraeus recently reported to Secretary Gates that, "There has been a 67% reduction in graduated force incidents involving contractors, and both the Government of Iraq and the Iraqi people have taken notice of the changes made in the operating procedures and attitudes of PSCs."

In recent testimony, I have discussed the potential consequences of any policy decision to replace PSCs in Iraq and Afghanistan with military forces. Using Congressional Budget Office methodology from their 2005 contractor study on Logistics Support for Deployed Military Forces, it would require the manpower equivalent of nine brigades of manpower to support that role. Such a requirement would be a major challenge for DoD to resource.

## **Contractor Role in Detainee Interrogations**

Detainee operations are a matter of great importance to the U.S. Government, as much as they are a matter of sensitivity. This testimony addresses only the question of the role of DoD contractor personnel in detainee interrogations.

The role of contractors in detainee operations is governed by a number of DoD policy Directives and Instructions:

- DoD Directive (DoDD) 2310.01E (September 5, 2006) specifies that,
  - “The Under Secretary of Defense for Intelligence shall exercise primary responsibility for developing policy pertaining to DoD intelligence interrogations, detainee debriefings, and tactical questioning . . . .” (Paragraph 5.4.1.).
  - “All DoD contracts pursuant to which contractor employees interact with detainees include a requirement that such contractor employees receive training regarding the international obligations and laws of the United States applicable to detainee operations.” (Paragraph 5.3.1.)
  - “The Under Secretary of Defense for Acquisition, Technology and Logistics shall ensure contractor employees accompanying DoD components in conducting, participating in, or supporting detainee operations complete training and receive information on the law, regulations, and policies applicable to detention operations, and the requirements to report possible, suspected, or alleged violations that arise in the context of detention operations . . . .” (Paragraph 5.3.2.)
- DoD Directive 3115.09 (November 3, 2005) states that,
  - “The Under Secretary of Defense for Intelligence shall exercise primary responsibility for DoD intelligence interrogations, detainee debriefings, and tactical questioning and serve as the advisor to the Secretary and Deputy Secretary of Defense regarding DoD intelligence interrogations policy.” (Paragraph 4.1 and 4.1.1.)

- “A trained and certified DoD interrogator shall monitor all interrogations, debriefings, and other questioning conducted by non-DoD or non-U.S. Government agencies or personnel.” (Paragraph 3.4.4.3.)
- DoD Instruction (DoDI) 1100.22 (September 7, 2006) states that:
  - “Direction and control of intelligence interrogations are IG functions. This includes the approval, supervision, and oversight of interrogations. However, in areas where adequate security is available and is expected to continue, properly trained and cleared contractors may be used to draft interrogation plans for government approval and conduct government-approved interrogations consistent with DoD Directive 3115.09, if they are properly supervised and closely monitored throughout the interrogation process by sufficient numbers of properly trained government officials.” (Paragraph E2.1.6.2.).

### **Status of Legal Accountability Jurisdiction over Deployed Contractors**

All DoD contractor personnel, regardless of nationality, are legally accountable for their conduct in complying with the DoD policies and regulations, as well as with the laws of the United States and applicable laws of the host country. This legal accountability proceeds from a number of statutes including:

- The Uniform Code of Military Justice (UCMJ), extended by Section 552 of the NDAA for FY 2007 to cover all contractors located outside the United States accompanying the military forces in the field in contingency operations against a hostile force.
- The Military Extraterritorial Justice Act (MEJA) provides federal criminal jurisdiction over felony-level crimes committed by DoD civilian employees and contractors (except host country nationals) accompanying the Armed Forces outside the United States.
- Other statutes address legal accountability of U.S. citizens alleged to have committed specific crimes against other U.S. citizens and other criminal acts overseas.

- Coalition Provisional Authority (CPA) Order #17 is a law signed into effect prior to the transfer of authority to the Government of Iraq in 2004 and is scheduled to expire with the conclusion of the UN Security Council mandate of the Multi-National Force-Iraq, currently set for December 31, 2008,. It provides non-Iraqi contractor personnel working on behalf of Coalition Forces (as well as those working for foreign diplomatic or consular missions, or foreign humanitarian aid, reconstruction or development projects) immunity from Iraqi legal process for acts committed pursuant to the terms and conditions of their contract. Assuming no further action by the UN Security Council, any continuing immunity after December 31 2008 for individuals not covered through other means, will have to be provided for in negotiations between foreign governments and the Government of Iraq. Otherwise, such contractors may be subject to Iraqi laws and its criminal justice system.

While DoD civilian employees and DoD contractors are considered to be legally accountable for their actions, both DoD and the State Department are on record about the need for legislation to strengthen the legal accountability of other U.S. Government contractor personnel deployed outside the United States.

#### **Status of efforts to Implement Sections 861 and 862 of the 2008 NDAA**

DoD has launched a number of significant initiatives to strengthen the management of DoD contractors accompanying deployed military forces. Also, we are currently implementing a Memorandum of Agreement with the State Department signed on December 5, 2007, to strengthen the coordination of DoD and State PSC operations in Iraq. We are now working actively with the State Department and the U.S. Agency for International Development (USAID) to address the requirements of Sections 861 and 862 of the NDAA for FY 2008. Sections 861 requires the establishment of a Memorandum of Understanding (MOU) among DoD, the State Department, and USAID, to cover all contracts being implemented in Iraq and Afghanistan, and all contractors and contractor personnel there. In addition, Section 861 requires the establishment of a comprehensive data base of contract and contractor personnel data, available on an on-line basis to appropriate Legislative Branch Committees and the GAO.

Progress is well underway regarding the drafting of an MOU responsive to the requirements of Section 861, and there should be no problem in executing such an MOU by the deadline on July 1, 2008. The more difficult challenge will be the establishment of the data bases required under Section 861 to provide the multi-disciplinary data bank required to be put in place. Efforts have already been launched to define the software and system requirements to support this requirement, with a view towards compliance with the requirement to implement the provisions of the MOU within 120 days of its execution.

Similarly, work is underway to implement the provisions of Section 862 of the NDAA for FY 2008. In this section, Congress has acknowledged the use of PSC's, and has prescribed specific requirements for their oversight in a declared combat operation. It requires the Secretary of Defense, in coordination with the Secretary of State, to prescribe regulations governing the policies, procedures and operational control of private security contractors under contract to DoD, the State Department, and USAID for work in Iraq and Afghanistan. In several ways, these regulations will be much broader than the currently effective MOA between DoD and the State Department relating to the coordination of PSC operations in Iraq. Nonetheless, major elements of the MOA will form the core of the regulations currently being drafted to comply with Section 862.

In closing, I would like to highlight the fact that the DoD, the Government Accountability Office (GAO), the Office of Management and Budget (OMB), the Congressional Budget Office (CBO), and the Congressional Research Service (CRS) have continuously reviewed the expanded use of PSCs, the potential for their performance of inherently governmental functions, and the appropriateness and manner in which they are employed.

Hopefully, this testimony provides a documentary baseline of the four topics I was asked to address at this hearing. I will be happy to answer any questions you have regarding the policy framework regarding contractors in these areas of concern and interest. Thank you.